BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

CHRIS GRANGER	)	
Claimant	)	
VS.	)	
	)	Docket No. 231,730
GREAT WESTERN DINING SERVICE	)	
Respondent	)	
AND	)	
	)	
ROYAL INSURANCE COMPANY OF AMERICA	)	
Insurance Carrier	)	

ORDER

Respondent and its insurance carrier appeal from an Award entered by Administrative Law Judge John D. Clark on March 9, 2000. The Appeals Board heard oral argument on August 18, 2000.

APPEARANCES

Kelly W. Johnston of Wichita, Kansas, appeared on behalf of claimant. Clifford K. Stubbs of Lenexa, Kansas, appeared on behalf of respondent and its insurance carrier.

RECORD AND STIPULATIONS

The Appeals Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

The Administrative Law Judge awarded benefits for a 53 percent disability based on functional impairment. Respondent asks for review of the following issues:

1. Did claimant's injury arise out of and in the course of his employment? The injuries at issue arose from a fight at work. The ALJ found the fight occurred because claimant was performing his duty as a supervisor to correct the conduct of another employee. Respondent, on the other hand, contends the dispute arose out of a personal disagreement imported to work. Claimant asks that the award be affirmed and argues that even if the fight was purely

personal, the claim should be compensable because claimant's injuries were made worse by a risk of employment when he hit his head on the concrete floor.

2. Is claimant's positive test for marijuana admissible pursuant to K.S.A. 44-501? The ALJ found the test to be inadmissible on the grounds the various conditions for admissibility found in K.S.A. 44-501d(2) were not met. Respondent contends the test results were admissible and argues claimant was impaired and the impairment contributed to the accident. Respondent argues that benefits should be denied on this basis as well.

3. What is the amount of reimbursement due respondent and its insurance carrier pursuant to K.S.A. 44-534a(b)? If benefits are denied, respondent asks that the Board determine the amount of reimbursement respondent should receive from the Kansas Workers Compensation Fund pursuant to K.S.A. 44-534a(b).

4. What is the nature and extent of claimant's disability? If the claim is found to be compensable, respondent argues the disability is less than found by the ALJ.

Claimant raises an additional issue. The Award provides for future medical treatment upon application to and approval by the Director. Claimant argues that future medical treatment with Dr. Michael G. Ludlow should be specifically authorized as part of the award.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record and considering the arguments, the Appeals Board finds the award of disability should be modified. Claimant is awarded 52 percent disability based on functional impairment. Claimant is also granted future medical treatment with Dr. Michael G. Ludlow.

Findings of Fact

1. Claimant worked as a manager of respondent's cafeteria and, as manager, supervised employees who worked at the cafeteria. The employees included claimant's brother, Billy Granger.

2. In January 1998, Billy Granger lived with claimant and claimant's girlfriend. Billy was separated from his wife and daughter who had moved to Florida.

3. When claimant awoke on the morning of January 12, 1998, he discovered Billy had smoked his last cigarette. Claimant woke Billy up and an argument ensued. Claimant went to the store, bought cigarettes, and returned to the apartment. Claimant and Billy watched

television for a short period of time. Claimant then left for work. Before leaving, he asked Billy if he wanted to go and Billy responded that he would be in by 9 a.m. Claimant left for work around 7:30 and when Billy was not at work by 9 a.m., claimant called him at home to see if Billy was coming to work. Billy responded that he was. Billy had made a phone call to his wife in Florida and testified that the conversation did not go well.

4. Billy arrived at work around 10 a.m. in a bad mood and began slamming pots and pans in the kitchen. Claimant told Billy to stop and when he did not, claimant told Billy to clock out and go home. The two began arguing and ultimately Billy struck claimant. Billy was the first to put his hands on the other and struck the first blow. Claimant fell to the ground and hit his head on the concrete floor causing a skull fracture and other injuries.

5. The Board finds that the fight was precipitated by claimant's efforts to perform his responsibility as manager to quiet the disturbance created by his brother and ultimately by claimant's request that Billy clock out and leave. From the record, it appears likely that Billy's initial disruptive behavior may have been the result of a combination of factors including the dispute about smoking the last cigarette and his unpleasant conversation with his wife. But it also appears that for claimant the dispute over the cigarettes was no longer a significant issue. Witnesses who talked with him before the fight indicate claimant gave the dispute as a reason Billy had not come to work with claimant, but they also generally indicated that claimant no longer seemed upset about this. The dispute at work became physical when claimant asked Billy to clock out and leave. This was Billy's response to claimant's exercise of his authority and performance of claimant's duty as manager. Finally, Billy was the aggressor in turning the dispute into a physical fight. He struck the first, perhaps the only, blow. Although claimant does not remember, this fact is supported by Billy's testimony and by the testimony of the Coca-Cola delivery person who observed Billy backing claimant up and then saw Billy strike claimant.

6. Respondent has asserted that claimant's use of marijuana contributed to the injury. The only evidence offered was a lab report that was part of the hospital records. The report states that the "Chain-of-custody protocol not followed; no chain-of-custody form submitted with specimen. Unable to verify/document authenticity of sample."

7. Dr. Mitchel A. Woltersdorf, Dr. P. Brent Koprivica, Dr. Peter V. Bieri, and Dr. Joseph B. Sullivan testified regarding the extent of claimant's functional impairment.

8. The Board finds claimant has a 52 percent functional impairment.

Dr. Woltersdorf, a neuropsychologist, first saw claimant as an inpatient at Lourdes Rehabilitation Hospital. Dr. Jane K. Drazek referred claimant to Dr. Woltersdorf for an evaluation of closed head injury. Claimant reported double vision, headaches, forgetfulness, anosmia, emotional lability, and word finding problems. Dr. Woltersdorf administered a set of tests and reported the results in a letter dated April 28, 1998. Dr. Woltersdorf saw claimant a second time on April 1, 1999. He tested claimant again and

following this second visit rated claimant's impairment as 14 percent of the whole person for diminished verbal capacity as expressed in reading and word finding difficulties as well as the post-concussive constellation of symptoms. He also testified he left it to the neurologists to rate the seizure activity.

Dr. Woltersdorf reviewed the report and rating by Dr. Bieri. Dr. Bieri had added Dr. Woltersdorf's 14 percent impairment to an impairment assigned by Dr. Bieri for other factors. Dr. Woltersdorf noted some overlap because he believed Dr. Bieri had separately rated for the anosmia and anosmia was included in Dr. Woltersdorf's post-concussive constellation of symptoms. Dr. Woltersdorf also testified that claimant's residual diplopia was part of the post-concussive constellation and to the extent Dr. Bieri included the diplopia in his separate rating, this would also overlap.

To 14 percent from Dr. Woltersdorf, Dr. Bieri added 14 percent for the seizure disorder. These combined under the combined values chart of the AMA *Guides to the Evaluation of Permanent Impairment* equal a 26 percent whole body impairment. Dr. Bieri also assigned 2 percent for disfigurement secondary to the tracheotomy and 8 percent for residuals of injury to the left brachial plexus and radial sensory loss. Finally, he added 5 percent for anosmia. He combined these for a total whole person impairment of 36 percent.

Dr. Bieri testified that the anosmia is, under the *Guides*, expected to be rated separately. Based on Dr. Bieri's reference to page 140 of the *Guides*, this appears to be correct. It does not appear, however, that Dr. Bieri was aware that Dr. Woltersdorf considered the anosmia to be part of the 14 percent total he assigned. By adding the 14 percent from Dr. Woltersdorf and then also adding 5 percent for anosmia, Dr. Bieri was, in effect, adding the anosmia twice in his total rating. While the record does not state how much of Dr. Woltersdorf's rating was for anosmia, claimant has the burden and we will assume all of the 5 percent assigned by Dr. Bieri is in the 14 percent of Dr. Woltersdorf. The total rating by Dr. Bieri is, therefore, 33 percent. This includes 14 percent from Dr. Woltersdorf, 14 percent for seizure disorder, 2 percent for disfigurement, and 8 percent for residuals of the brachial plexus injury and radial sensory loss, all combined under the combined values chart.

Dr. Koprivica saw claimant at the request of respondent's attorney. Dr. Koprivica assigned a 27 percent impairment rating. This rating included 14 percent for behavioral problems due to the brain injury, 10 percent for the seizure disorder, and 5 percent for the loss of smell. He testified claimant did not have diplopia at the time he saw claimant and Dr. Koprivica, therefore, gave no rating for diplopia. Dr. Koprivica agreed that if diplopia had been present he would not have the technical expertise to rate this condition.

Dr. Joseph B. Sullivan, an optometrist, saw claimant initially in March 1998 for treatment of claimant's double vision. Claimant had lateral and vertical misalignment of his eyes. Dr. Sullivan also saw claimant in December 1999 at the request of claimant's attorney. Dr. Sullivan assigned an impairment rating of 24 percent of the whole person

based on total loss of vision of one eye. Claimant also suffers from eye movement problems separate from double vision. He is not able to get his eyes to track properly across a page. Dr. Sullivan added 10 percent of the whole person for this separate condition and combined the two problems for a rating of 34 percent of the whole person. According to Dr. Sullivan, the impairment was caused by the head injury.

The Board concludes claimant has a 52 percent functional impairment. This conclusion gives equal weight to the opinions of Dr. Bieri and Dr. Koprivica to first arrive at a rating of 30 percent impairment for all impairment except the eye impairment. The Board then considered Dr. Sullivan's rating to be a 32 percent impairment rather than 34 percent because under the AMA *Guides*' combined values chart 24 percent and 10 percent combined to 32 percent. The 30 percent combined with the 32 percent for vision impairment, again using the combined values chart of the AMA *Guides*, yields 52 percent.

9. Claimant has, since this injury, returned to work for respondent and is earning a wage that is 90 percent or more of his wage at the time of the injury.

10. Dr. Ludlow, claimant's primary treating physician, has testified that claimant will need periodic blood chemistry and liver toxicity screening. Claimant will need to take valproic acid and have his blood levels tested periodically.

Conclusions of Law

1. Claimant has the burden of proving his right to an award of compensation and of proving the various conditions on which that right depends. K.S.A. 1997 Supp. 44-501(a).

2. The Board concludes claimant's injury arose out of and in the course of his employment. The phrases "out of" and "in the course of" have distinct and separate meanings. *Newman v. Bennett*, 212 Kan. 562, 512 P.2d 497 (1973). The phrase "out of" points to the cause or origin of the injury. The injury arises "out of" the employment if it arises out of the nature, conditions, obligations, and incidents of employment. *Hormann v. New Hampshire Ins. Co.*, 236 Kan. 190, 689 P.2d 837 (1984). The words "in the course of" refer to the time and place of the injury and simply means that the injury must happen while the employee is at the work of the employer. *Springston v. IML Freight, Inc.*, 10 Kan. App. 2d 501, 704 P.2d 394, *rev. denied* 238 Kan. 878 (1985). In this case, the triggering or precipitating cause of the fight was claimant's exercise of his authority and responsibility as a manager. This factor causally connects the injury to claimant's employment. The Board concludes the injury is compensable.

3. The Board finds claimant has a 52 percent disability. Because claimant has returned to work at 90 percent or more of his preinjury wage, claimant is limited to disability based on functional impairment. K.S.A. 44-510e.

4. K.S.A. 44-510f(4) limits awards for permanent partial disability based on functional impairment to $50,000. Claimant has challenged the constitutionality of this limit. The Board does not have authority to declare an act of the legislature to be unconstitutional but notes for the record that this issue has been raised. The Board will apply the limit here as the legislature has directed. The limit, in K.S.A. 44-510f(4), does not apply to temporary total or temporary partial disability benefits.

5. K.S.A. 1997 Supp. 44-501d(2) identifies six conditions for admissibility of drug tests. The record does not establish that those conditions were met in this case. The purported test results are not admissible.

6. Respondent's request for reimbursement of temporary total disability and medical expenses under K.S.A. 1997 Supp. 44-534a is rendered moot by the finding that this case is compensable.

7. Claimant should be, and is, awarded future medical treatment with Dr. Ludlow as the authorized treating physician.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award entered by Administrative Law Judge John D. Clark on March 9, 2000, should be, and the same is hereby, modified.

WHEREFORE AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Chris Granger, and against the respondent, Great Western Dining Service, and its insurance carrier, Royal Insurance Company of America, for an accidental injury which occurred January 12, 1998, and based upon an average weekly wage of $406.92, for 24.29 weeks of temporary total disability compensation at the rate of $271.29 per week or $6,589.63, followed by 184.30 weeks at the rate of $271.29 per week or $50,000 for a 52% permanent partial disability, making a total award of $56,589.63.

As of September 29, 2000, there is due and owing claimant 24.29 weeks of temporary total disability compensation at the rate of $271.29 per week or $6,589.63, followed by 117.28 weeks of permanent partial disability compensation at the rate of $271.29 per week in the sum of $31,816.89, for a total of $38,406.52 which is ordered paid in one lump sum less any amounts previously paid. The remaining balance of $18,183.11 is to be paid for 67.02 weeks at the rate of $271.29 per week, until fully paid or further order of the Director.

Claimant is awarded future medical treatment with Dr. Ludlow as the authorized treating physician.

The Appeals Board also approves and adopts all other orders entered by the Award not inconsistent herewith.

IT IS SO ORDERED.

Dated this ____ day of September 2000.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Kelly W. Johnston, Wichita, KS
Clifford K. Stubbs, Lenexa, KS
John D. Clark, Administrative Law Judge
Philip S. Harness, Director